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No. 90-434

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1990

SONICRAFT, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

and

WAREHOUSE, MAIL ORDER, OFFICE, TECHNICAL AND PROFESSIONAL EMPLOYEES UNION, LOCAL 743, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO,
Intervening Respondent

BRIEF ON BEHALF OF INTERVENING RESPONDENT TEAMSTERS UNION LOCAL 743 IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the Court of Appeals err as a matter of law in ruling that the National Labor Relations Board properly amended the complaint at trial to allege as violations of the National Labor Relations Act conduct of Petitioner, Sonicraft, Inc., that had been subject of an unfair labor practice charge which was dismissed more than six months prior to the amendment?

2. Did the Court of Appeals err as a matter of law in ruling that the Board's order, which found Petitioner unlawfully laid off and discriminatorily recalled employees in reprisal for their union sympathies and interrogated and threatened employees and created the impression their activities were under surveillance, was supported by substantial evidence?

PARTIES TO THE PROCEEDINGS

Sonicraft, Inc., Petitioner/Cross-Respondent-Petitioner.

National Labor Relations Board, Respondent/Cross-Petitioner-Respondent.

Warehouse, Mail Order, Office, Technical and Professional Employees Union, Local 743, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, Intervening-Respondent/Cross-Intervening Petitioner-Intervening Respondent.

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STATEMENT OF THE CASE

This case involves a union organizing campaign begun in August 1981 and the mass layoff of 50 of 92 bargaining unit employees on December 13, 1981, two days after the Union's election victory. What the United States Court of Appeals for the Seventh Circuit described as "a straightforward case" (905 F.2d 146, 149 (June 12, 1990)) has since labored its way through administrative and judicial proceedings over the ensuing nine years. At issue is the proprietary of the National Labor Relations Board's ("Board") order permitting its General Counsel to amend an unfair labor practice complaint thirteen months later, alleging that Sonicraft, Inc. ("Petitioner" or "Sonicraft") violated the National Labor Relations Act (29 U.S.C. §§151 et seq.) ("Act) by laying off the employees.

STATEMENT OF FACTS

Sonicraft researches, develops and manufactures electronic and electro-mechanical systems, almost exclusively under contracts with the United States Department of Defense. Local 743, International Brotherhood of Teamsters ("Union") petitioned for and won a Board-conducted election on December 11, 1981 and was certified as the exclusive bargaining representative of Sonicraft's production, maintenance and warehouse employees on July 16, 1982.[1] On Sunday,

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[1]By its Supplemental Decision and Order dated September 24, 1985, the Board vacated the Union's certification of representative, set aside the December 1981 election, and dismissed an unfair labor practice complaint alleging that Sonicraft unlawfully failed and refused to recognize and bargain with the Union. 276 NLRB 407 (R.: Exh. I)

Citations to the decisions and documents in the proceedings below, appended to Petitioner's brief to the court of appeals, will be designated as "R.: _____."

December 13, 1981, Sonicraft notified 50 of its 92 employees that they were being laid off indefinitely. Sonicraft subsequently recalled 7 employees between December 15 and 19, and 16 employees were recalled in February 1982. (R.: Exh. C at 8)

The Union filed an unfair labor practice charge with the Board on February 22, 1982, alleging that Sonicraft violated Section 8(a)(1) of the Act (29 U.S.C. 158(a)(1)) by interrogating and threatening employees, promising them benefits, creating the impression that the employees' Union activities were under surveillance, and making statements indicating to employees the futility of Union representation. The charge also alleged that Sonicraft laid off and refused to recall the employees because they

selected the Union as their bargaining representative, in violation of Section 8(a)(3) of the Act (29 U.S.C. 158(a)(3)). (R.: Exh. H)

Following an investigation, the Board issued a complaint on April 29, 1982, alleging numerous separate violations of Section 8(a)(1) and a violation of Section 8(a)(3) by Sonicraft's refusal to recall 4 employees following the December layoffs. (R.: Exh. G) Also on April 29, the Board's Regional Director notified the parties that he was dismissing the Union's allegation that Sonicraft unlawfully laid off the employees, stating that the evidence was insufficient to show that the employees were laid off because they voted for the Union, they engaged in other Union and/or protected, concerted activities, or for any reasons other than

Sonicraft's economic justification. (R.: Exh. F) The Board's General Counsel subsequently denied the Union's appeal from the dismissal of that allegation and its request for reconsideration. (R.: Exh. C at 3)

The hearing on the April 1982 complaint lasted 24 days, from October 6, 1982 to May 24, 1983. The General Counsel successfully amended the complaint when the trial opened to allege two additional Section 8(a)(1) violations and, several days into the hearing, moved to amend the complaint further by alleging that the December 1981 layoffs of approximately 30 employees and Sonicraft's refusal to recall them were unlawful. The General Counsel based its motion on new evidence obtained through a recent interview of an employee and records received in

response to a subpoena, particularly a tape recording of a pre-election speech given by Sonicraft's President.

By letter dated December 1, 1982, the Regional Director revoked his earlier partial dismissal of the layoff-recall allegations, based on consideration of the new evidence presented. (R.: Exh. C at 3) The Administrative Law Judge denied the motion to amend on December 1; the Board reversed his ruling on December 8, directing the Judge to grant the motion to amend the complaint. The Board also denied, on February 7, 1983, Sonicraft's motion for reconsideration of its decision approving the complaint amendment. (R.: Exh. C at 4)

The regional office investigator was permitted to testify during the hearing concerning whether the evidence relied

on by the General Counsel in amending the complaint was previously offered and/or provided to the Board during its investigation of the charge. Sonicraft also was permitted to examine and copy any material in the investigatory case file indicating whether the Regional Director was or should have been aware of the evidence concerning the mass layoffs when he dismissed the allegations in April 1982. (Id.)

The Administrative Law Judge, in his February 14, 1984 decision, rejected the Company's arguments that the complaint amendment was improper because the General Counsel changed his position more than six months after the layoffs. The Judge found that the layoff issue in the complaint amendment was "reasonably related to the recall from layoff issue in the original Complaint, [and] evi-

dence of the former was effectively intertwined with evidence of the latter." (R.: Exh. C at 7) The Judge found that Sonicraft committed numerous violations of Section 8(a)(1) and violated Section 8(a)(3) of the Act by laying off 50 employees on December 13, 1981, by discriminatorily selecting for layoff and refusing to timely recall 8 employees, and by refusing to recall 2 employees. The Judge ordered Sonicraft to reinstate immediately and fully all of the employees and to make them whole for any loss of wages and benefits.

Eleven months after the Administrative Law Judge issued his decision, the Board issued its decision in Ducane Heating Corp., 273 NLRB 1389 (1985), enforced without opinion, 785 F.2d 304 (4th Cir. 1986), overruling California Pacific Signs, 233 NLRB 450

(1977), on which the Judge relied. In Ducane Heating, the Board held that "a dismissed charge may not be reinstated outside the 6-month limitations period of Section 10(b) absent special circumstances in which a respondent fraudulently conceals the operative facts underlying the alleged violation. Where there is a fraudulent concealment, the limitations period begins to run when the charging party knows or should have known of the concealed facts." 273 NLRB at 1390. The Board remanded this case to the Administrative Law Judge, by Order dated March 27, 1985, "for the limited purpose of addressing the Section 10(b) issues relating to the complaint amendment pertaining to the December 1981 employee layoffs in question in light of Ducane Heating Corp., supra." (R.: Exh. D at 2)

In his December 11, 1985 Supplemental Decision, the Judge reaffirmed his earlier findings and conclusions, but following the Ducane Heating remand, the Judge found specifically that Sonicraft made material misrepresentations during the investigation of the unfair labor practice charge concerning the audio tape of the President's pre-election speech to employees[2] and that those misrepresentations "influenced" the General Counsel's dismissal of the mass layoff

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[2]Sonicraft's counsel represented to the Regional Office investigator that the Company taped the President's speech and the question-and-answer session with employees but that the audio tape was undecipherable and, in any event, the President did not make any unlawful statements. A transcript of the taped speech and question-and-answer session showed otherwise. (R.: Exh. B at 6-10; Exh. C at 17-22)

allegations. The Judge found that in these circumstances Sonicraft's misrepresentations tolled the Section 10(b) statute of limitations, and the complaint amendment was proper. (R.: Exh. B at 13)

The Judge also found that the amended allegations were closely related "to the undismissed portion of the charge which spawned the Complaint." (R.: Exh. B at 19) The Judge found that the Board's Ducane Heating decision did not overrule the well-settled Board and court-approved "closely related" doctrine. The Judge noted specifically that Section 10(b) does not preclude amending a charge or a complaint involving incidents that are "similar to and arise out of the same course of conduct as those alleged in the timely-filed charge." (Id. at 19, quoting

Kelly-Goodwin Hardwood Company, 269 NLRB 33, 36 (1984), enfd. by memorandum opinion, Nos. 84-7243 and 84-7351 (9th Cir. 1985)). See also, Sonicraft, Incorporated, 905 F.2d at 148.

The Complaint amendment involved the layoff and refusal to recall the employees. The Judge noted that the amended allegations involved the same employer and the same bargaining unit; they arose out of the same organizing campaign; and they were closely related in time. The Judge further noted that "it was virtually impossible to determine which, if any, employees were discriminatorily recalled without considering all the recalls as well as the original reason they were laid off. Surely the reason for the layoffs provided a backdrop to explain the reason for the recalls and, since some recalls

took place within days of the layoff, the question lingers why a layoff occurred in the first place." (Id. at 20) Moreover, the layoff and refusal to recall allegations were based on the same alleged discriminatory conduct and provisions of the Act which supported finding unlawful the refusal to recall 4 employees, as alleged in the original Complaint. (Id.)

The Judge noted further that Sonicraft did not question the validity of the Complaint amendment on grounds of unfairness or prejudice. In fact, the Judge stated, Sonicraft suffered no prejudice. Board law at the time clearly permitted the amendment under Section 10(b); there was no lapse of time or loss of memory or records which hindered the Company's defense; and the Company had preserved the records neces-

sary to defend the recall allegations. The Judge therefor found that the General Counsel was not precluded from amending the Complaint to allege the discriminatory mass layoff, selection of employees for layoff, and refusal to recall specific employees, even though the conduct occurred 11½ months before the amendment. (Id. at 26)

The Board majority (Members Johansen and Devaney, with Chairman Stephens dissenting) adopted the Administrative Law Judge's Supplemental Decision by Order dated June 15, 1989. (R.: Exh. A) In the interim the Board had issued its decision in Redd-I Inc., 290 NLRB No. 140, 129 LRRM 1229 (1988), in which the Board limited Ducane Heating to "an attempt to reinstate the dead allegations themselves without reference to any other pending timely charge."

Redd-I Inc., 129 LRRM at 1231. The Board agreed with the Judge's analysis and conclusions that the amendment allegations were closely related to the outstanding timely filed charge[3] and that, absent a showing of surprise, Sonicraft suffered no denial of due process. (R.: Exh. A at 2, fn. 2 (case citations omitted)) Having found that the amendment allegations were closely related to the content of the original charge, the Board found it unnecessary to reach the fraudulent concealment issue.

Sonicraft argued to the court of appeals that the Board's decision in Ducane Heating overruled the "closely related" doctrine, even if sub silentio,

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[3]Chairman Stephens agreed, in dissent, that the allegations in the timely filed charge and the Complaint amendment were closely related.

and precluded use of that theory to add to a complaint allegations that were previously dismissed. See 905 F.2d at 148-49. The Company also argued, inter alia, that the "closely related" doctrine should apply only to situations where the additional complaint allegations never were subject of an unfair labor practice charge, rather than allowing the General Counsel to resurrect previously dismissed or withdrawn unfair labor practice charge allegations.

The court of appeals rejected the Company's arguments, noting that Redd-I explicitly stated that the "closely related" doctrine survived Ducane Heating. 905 F.2d at 149. The court of appeals, in an opinion by Judge Posner, reviewed the Board's "common law" doctrine, paralleling Rule 15(c) of the

Federal Rules of Civil Procedure, "that an amendment which is 'closely related' to the original charge relates back to the date of the original complaint." 905 F.2d at 148 (case citations omitted). The court found that the allegations concerning the layoffs were indeed closely related to those of the discriminatory recall and, in fact, "were the one-two punch in the company's scheme of retaliation." Id.

Sonicraft did not argue before the court of appeals that the belated Complaint amendment impeded its defense or prejudiced it in any way; nor did the Company argue that it was lulled into thinking that it would no longer be faced with the prospect of litigating the legality of the layoffs that occurred 11½ months before. The court rejected Sonicraft's argument that, once

a charge is dismissed or withdrawn, it is dead. Death may in fact be final but the allegations in the "dead" charge may be resurrected if they are closely related to those in a live, timely-filed charge.

The court of appeals found Sonicraft's distinction between withdrawn and dismissed allegations to be unavailing. Redd-I involved a withdrawn charge; Ducane Heating, and Sonicraft, involved dismissed charges. Although the Board relied on Redd-I in affirming the Judge in this case, and did not explain the difference between Redd-I (withdrawn) and Ducane Heating (dismissed), the court found, cited and relied on a case not previously cited to it. In Stern Entertainment System, Inc., t/a Heaven, 290 NLRB No. 167, 130 LRRM 1147 (1988), issued just one week

after Redd-I, the Board held expressly that Redd-I and the "traditional 'closely related' test" would apply to withdrawn as well as dismissed charges. 130 LRRM at 1149. Thus, the court declared, the "last link in the chain of precedent from Ducane to the present case has been forged." 905 F.2d at 149.

The court summarily rejected The Company's attacks on the Administrative Law Judge's findings of fact, finding them supported by overwhelming evidence. Finally, the court also rejected the Company's contention that this Court's decision in Wards Cove Packing Co. v. Atonio, 490 U.S. ____, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989) repudiated the Board's rule, endorsed in NLRB v. Transportation Management Corp., 462 U.S. 393, 103 S.Ct. 2469, 76 L.Ed. 667 (1983), that in a mixed-motive case the

burden of negating causation is on the employer. The court of appeals noted that Transportation Management was cited approvingly in Price Waterhouse v. Hopkins, 490 U.S. ____, 109 S.Ct. 1775, 1788, 104 L.Ed.2d 268 (1989). That the Company would have laid off the employees anyway, even two days after the Union won its election, was an affirmative defense on which Sonicraft had the burden of persuasion. The court found Sonicraft failed to carry it. 905 F.2d at 150. In enforcing the Board's Order, the court of appeals passed over other issues raised by Sonicraft.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS PROPERLY REJECTED SONICRAFT'S ARGUMENT THAT PORTIONS OF THE AMENDED COMPLAINT WERE BARRED BY SECTION 10(b).

A. The Allegations Of The Complaint Amendment Were Closely Related To The Undismissed Allegations In The Original Unfair Labor Practice Charge And Properly Were Reinstated And Litigated.

Section 10(b) of the Act (29 U.S.C. §160(b)) provides, in relevant part, that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge. . . ." Section 10(b) also states that "[a]ny such complaint may be amended by the . . . Board in its discretion at any time prior to the issuance of an order based thereon." The six month limitation period of Section 10(b) "applies only to the filing and service of a charge and not to the issu-

ance or amending of a complaint." NLRB v. Complas Industries, Inc., 714 F.2d 729, 734 (7th Cir. 1983).

"A complaint, as distinguished from a charge, need not be filed . . . within the six months, and may therefor be amended after the six months." NLRB v. Dinion Coil Co., 201 F.2d 484, 491 (2d Cir. 1952). The Supreme Court stated in NLRB v. Fant Milling Co., 360 U.S. 301, 307, 79 S.Ct. 1179, 3 L.Ed.2d 1243, (1959), that "a charge filed with the Labor Board is not to be measured by the standards applicable to a pleading in a private lawsuit. Its purpose is merely to set in motion the machinery of an inquiry." Further, "[o]nce [the Board's] jurisdiction is invoked [by the filing of an unfair labor practice charge] the Board must be left free to make full inquiry. . . . There is no

justification for confining such an inquiry to the precise particularities of a charge." NLRB v. Fant Milling Co., 360 U.S. at 308. Thus, a complaint that is based upon a timely-filed charge may be amended to include allegations not raised in the underlying charge if the additional allegations are "closely related" to the violations set forth in the charge and which occurred within six months of the date on which the charge was filed. NLRB v. Complas Industries, Inc., 714 F.2d at 733; NLRB v. Dinion Coil Co., 201 F.2d at 491.

Since the early history of the National Labor Relations Act, many cases interpreting it have given the Labor Board broad leeway in conducting its investigations and bringing complaints alleging unfair labor practices. The Supreme Court recognized in National

Licorice Company v. NLRB, 309 U.S. 350, 60 S.Ct. 569, 84 L.Ed. 799 (1940), that a complaint may include allegations of conduct that were not specified in the original unfair labor practice charge. In National Licorice, the petitioner contended that the unfair labor practice charge is a jurisdictional prerequisite to the complaint and subsequent proceedings are restricted to the specific unfair labor practices alleged in the charge. The Court rejected this argument, stating that:

> It is unnecessary for us to consider how far the statutory requirement of a charge as a condition precedent to a complaint excludes from the subsequent proceedings matters existing when the charge was filed, but not included in it. Whatever restrictions the requirements of a charge may be thought to place upon subsequent proceedings by the Board, we can find no warrant in the language or purposes of the Act for saying that it precludes the Board from dealing adequately with unfair labor prac-

> tices which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board.

309 U.S. at 369. The relationship between the existing charge and the complaint amendment allegations "need be close enough only to negate the possibility that the Board is proceeding on its own initiative rather than pursuant to a charge." NLRB v. Central Power & Light Co., 425 F.2d 1318, 1321 fn. 3 (5th Cir. 1970).[4]

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[4]The Supreme Court in Local No. 1424, International Machinists v. NLRB, 362 U.S. 411, 80 S.Ct. 822, 4 L.Ed.2d 832 (1960), stated that the policies underlying Section 10(b) "are to bar litigation over past events 'after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused,' HR Rep. No. 245, 80th Cong., First Sess., page 40, and of course to stabilize existing bargaining relationships." 362 U.S. at 419.

Following this reasoning, the Seventh Circuit in NLRB v. Complas Industries, supra, upheld the Board's amendment of a complaint to include an allegation of unlawful interrogation because that unfair labor practice was related to the claim of an employee's illegal discharge. The amended allegation

> grew out of the original allegation 'while the proceeding [was] pending before the Board.' . . . [T]he specific claim in the charge and the claim in the amended complaint were closely related in time; most importantly, the alleged interrogation would never have occurred but for the original charge, Texas Industries, Inc. v. NLRB, 336 F.2d 128, 132 (5th Cir. 1954); furthermore, the evidence used as a basis for the amended complaint would have been gathered during a proper investigation of the charge. . . . Thus, we conclude that inclusion of the claim of an illegal interrogation was not beyond the scope of the Board's authority, and that a filing of a new charge was not required to support the additional claim in the amended complaint.

714 F.2d at 733. See also, NLRB v. Braswell Motor Freight Lines, Inc., 486 F.2d 743, 746 (7th Cir. 1973).

The Board employs its traditional, well-settled test for determining whether complaint allegations are closely related to those in an underlying charge "without regard to whether another charge encompassing the untimely allegation has been withdrawn or dismissed." Redd-I Inc., 129 LRRM at 1233. See also, Sonicraft, Inc. v. NLRB, 905 F.2d at 148. Under the Board's "closely related" test, allegations that involve 'the same class of violations'" and are a "'continuation[] of the [violations] in pursuance of the same objects'" as those alleged in a timely-filed charge may be included in the complaint. NLRB v. Fant Milling Co., 306 U.S. at 307 (citation omitted).

See also, NLRB v. Braswell Motor Freight Lines, 486 F.2d at 746 (conduct complained of was "of the same class and character as . . . in the original charge," occurred "within the same general time period," and "was part of an overall plan to resist organization" and was properly included in complaint).

The Board recently reaffirmed its traditional "closely related" test in Redd-I Inc., supra.[5] The Board looks first at "whether the otherwise untimely allegations are of the same class as the

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[5]Contrary to the Petitioner's assertion, the Board's "closely related" doctrine is anything but "unrefined." (Ptr. Brf. at 17) See, e.g., Dinion Coil Co., supra; Sonicraft, Inc. v. NLRB, 905 F.2d at 148 (the Board's closely related doctrine parallels that of Rule 15(c), F.R.C.P., that an amendment closely related to original charge relates back to date of original complaint); and Redd-I Inc., 129 LRRM at 1231-32.

violations alleged in the pending timely charge," whether the allegations involve the same legal theory and provision of the Act. Second, the Board considers "whether the otherwise untimely allegations arise from the same factual situation or sequence of events as the allegations in the pending timely charge," whether the allegations involve similar conduct, "during the same time period with a similar object." Finally, the Board "may look at whether a respondent would raise the same or similar defenses to both allegations, and thus . . . would have preserved similar evidence and prepared a similar case" in defending against both allegations. Redd-I Inc., 129 LRRM at 1233.

Here the Union filed an unfair labor practice charge on February 22, 1982, alleging that Sonicraft unlawfully laid

off employees on December 13, 1981, and refused to recall them because they selected the Union as their bargaining representative. The charge also alleged that, beginning in August 1981, Sonicraft threatened and interrogated employees and created the impression that they were under surveillance. The Regional Director dismissed the mass layoff allegation and issued a complaint alleging that Sonicraft unlawfully refused to recall 4 employees and threatened, interrogated and conducted surveillance on employees both before and after the December 1981 layoffs. (R.: Exhs. F and G) Significantly, the Complaint alleged that one supervisor informed an employee that she was being laid off because of her Union activities and that this and another supervisor informed other employees that they were

not being recalled from layoff because of their Union activities. (R.: Exh. G at 3, ¶V(e), (f), (g)).

The Amended Complaint, filed on January 20, 1983, was based on evidence provided pursuant to a subpoena of Company documents. The amendment included the allegation that approximately 30 employees had been laid off and not recalled because of their Union activities. (R.: Exh. E, at 4, ¶VI).

These allegations involved the same employer, the same group of employees, occurred over the same time period (the mass layoff took place two days after the Board-conducted election), and arose out of the same factual situation and sequence of events --the Union election campaign. NLRB v. Fant Milling Co., supra; NLRB v. Braswell Motor Freight Lines, supra; Redd-I Inc., supra. As

the court of appeals stated, "The allegations in this case concerning the layoffs are closely related to the allegations of discriminatory recalls; the recalls began only 4 days after the layoffs, and the layoffs and the recalls were the one-two punch in the Company's scheme of retaliation." 905 F.2d at 148.

Therefore, the Board properly relied on its "closely related" doctrine to amend the Complaint thirteen months after the alleged unlawful layoffs, notwithstanding the fact that the layoff allegations previously had been dismissed for lack of sufficient evidence. The Board's Order finding Sonicraft violated the Act by laying off 50 employees and discriminatorily selecting employees for recall properly was enforced by the

Seventh Circuit Court of Appeals.[6]

Sonicraft's reliance on Local No. 1424 International Machinists v. NLRB, supra, is misplaced. There the Board litigated a Union-filed unfair labor practice charge alleging that the enforcement of a collective bargaining agreement was illegal, based on the fact that the Union did not enjoy majority

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[6]Petitioner's assertion at page 14 of its brief, that the alleged discriminatory recall of 4 employees "had nothing at all to do with the events which caused the layoff," is absolutely preposterous. The Administrative Law Judge, the Board and the court of appeals found otherwise. The decisions below found that the discriminatory recalls flowed directly from Sonicraft's anti-Union campaign and its hostile reaction to the employees selecting the Union as their exclusive bargaining representative. As the court of appeals stated, the evidence was overwhelming that the layoffs and selective recalls were motivated by Sonicraft's hostility to the Union and its supporters. 905 F.2d at 149.

status at the time of the contract's execution several years before the charge was filed. The Court held that the complaint was barred by the Section 10(b) statute of limitations, since "the entire foundation of the unfair labor practice charged was the Union's time-barred lack of majority status when the original collective bargaining agreement was signed. In the absence of that fact enforcement of this otherwise valid Union security clause was wholly benign." 362 U.S. at 417-418.

The Machinists Court addressed the question of whether Section 10(b) was a rule of evidence or a statute of limitations. First, Section 10(b) ordinarily does not bar the evidentiary use of conduct occurring outside the limitations period "to shed light on the true character of matters occurring within

the limitations period." 362 U.S. at 416. The second situation arises when conduct occurring within the six-month limitations period can be found to be an unfair labor practice only through reliance on time-barred evidence. In this situation, the use of earlier alleged unlawful conduct "is not merely 'evidentiary' since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful." 362 U.S. at 417. To permit the substantive use of time-barred conduct in such a manner, the Court stated, in effect results in reviving a legally dead unfair labor practice. Id.

What the Supreme Court condemned in Machinists was allowing the Board "to convert what is otherwise legal into something illegal," by relying on time-

barred evidence of an unfair labor practice as the sole basis for finding a violation. To do so, "would vitiate the policies underlying Section 10(b)." 362 U.S. at 419. Here, the Amended Complaint was based on allegations that occurred within six months of the filing of the unfair labor practice charge on which the initial Complaint was based. The mass layoff and discriminatory recall allegations were closely related, "the one-two punch," Sonicraft, Inc. v. NLRB, 905 F.2d at 148, to those in the undismissed charge and the initial Complaint. Contrary to Sonicraft's assertions, the Board's "closely related" doctrine is not at variance with the Supreme Court's ruling in Machinists and does not create an impermissible exception to Section 10(b).

B. There Is No Conflict Between The Courts Of Appeals Warranting Review Of This Case By The United States Supreme Court.

As a ground supporting its petition for writ, Sonicraft argues that the decisions of the Board and the court of appeals conflicts with decisions of other circuits, NLRB v. Electric Furnace Co., 327 F.2d 373 (6th Cir. 1963) and NLRB v. Silver Bakery, Inc., 351 F.2d 37 (1st Cir. 1965), and implicitly conflicts with NLRB v. Wizard Method, Inc., 897 F.2d 1233 (2d Cir. 1990). Ptr. Brf. at 16. Even a cursory review of the cited cases will reveal no conflict between the Seventh Circuit Court of Appeals decision below and the other circuits.

In Silver Bakery, supra, the First Circuit Court of Appeals denied enforcement of a Board order, rejecting the

Board's theory that the General Counsel has unlimited discretion to proceed on unfair labor practice charges, which in that case had been withdrawn leaving no pending proceedings. The Board had relied on "equitable principles" favoring the prosecution of the alleged unfair labor practice. The court of appeals found the Board's theory "was created out of whole cloth" and that there was no reason why the mere filing of an unfair labor practice charge "should leave the Board roving discretion" to determine whether the equities warranted the reinstatement of proceedings without time limitations. 351 F.2d at 39.

The Board's discretionary theory of prosecuting unfair labor practices was clearly repudiated in Ducane Heating, 273 NLRB at 1391, which overruled

California Pacific Signs, 233 NLRB 450 (1977) and Winer Motors, 265 NLRB 1457 (1982). (Winer Motors limited the General Counsel's discretion to reinstate withdrawn charges outside the six-month limitations period to cases involving fraudulent concealment by the respondent.)

The Sixth Circuit Court of Appeals denied enforcement of the Board's decision in Electric Furnace, supra. The Board found that the company's initial refusal to furnish the Union with requested information was a continuing violation which, although the information was supplied in January 1961, carried over into the six-month period before complaint issued in May 1961. The court of appeals rejected the Board's theory that the company's refusal to provide the requested infor-

mation was a continuing violation. Citing the Supreme Court's decision in Machinists, supra, the court of appeals stated, "To hold that this Act continues indefinitely in the absence of further requests by the union and under the circumstances here does violence to Section 10(b) and renders this provision of the Act virtually impotent." 327 F.2d at 376. See also, Lorance v. AT&T Technologies, Inc., 490 U.S. ____, 109 S.Ct. 2261, ____ L.Ed.2d ____ (1989) (Court rejected use of continuing violation doctrine to avoid limitations period under Title VII to cure untimeliness). Sonicraft's layoff of more than half of its workforce was not alleged or litigated as a continuing violation.

Finally, no conflict, implicit or otherwise, can be found with the Second

Circuit Court of Appeals decision in Wizard Method, Inc., supra. In that case, the Board's Regional Director reinstated a Section 8(a)(3) allegation one year after the employee's discharge. In enforcing the Board's Order, the court of appeals noted that the company waived its Section 10(b) defense by not raising it at trial or before the Board. Thus, the issue properly was not before the court. Moreover, this is the same court which issued Dinion Coil, which set forth the "most frequently cited test for finding allegations closely related." Redd-I Inc., 129 NLRB at 1231.

Accordingly, the court of appeals' decision below presents no conflict with decisions of other circuits, or with decisions of this Court, warranting review by the Court.

Finally, Sonicraft's arguments concerning the burden of proof in cases

alleging an employer's discriminatory motive, specifically that the Board with the court of appeals' approval has misplaced the burden of establishing the invalidity of respondent's defense, are singularly unavailing. The court of appeals properly and correctly determined that this Court's decision in Wards Cove Packing Co. v. Atonio, supra, did not abrogate the Board's longstanding burden of proof rule, endorsed in NLRB v. Transportation Management Corp., supra. See also, Price Waterhouse v. Hopkins, supra. The court of appeals determined that in Wards Cove the Supreme Court referred to and retained "a fine-spun distinction in Transportation Management found also in Price Waterhouse, rather than repudiating either decision." 905 F.2d at 150. Under Transportation Management, the

burden of proving the employer's union animus never shifts from the General Counsel; if the General Counsel carries that burden, the employer can defend the allegations by showing that the discharge or layoff would have taken place in any event, for nondiscriminatory reasons.

Sonicraft bore the burden of persuasion as to its affirmative defense that the layoffs two days after the Union election were the result of nondiscriminatory, economic considerations. As the court of appeals found, Sonicraft failed to carry it. 905 F.2d at 150.

CONCLUSION

Teamsters Union Local 743 respectfully requests that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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